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# After the Dust Settles: Military Tribunal Justice for Terrorists after September 11, 2001

## **Cover Page Footnote**

International Law; Commercial Law; Law

# After the Dust Settles: Military Tribunal Justice for Terrorists After September 11, 2001

“No man, no nation, is above the laws of common decency and morality. No man may stand higher than, or be exempt from, the law.”

- JOHN ALAN APPLEMAN<sup>1</sup>

## Introduction

It should be understood from the outset that military courts-martial are not the same thing as military commissions.<sup>2</sup> Both are venues through which military jurisdiction is exercised,<sup>3</sup> but they are very different in procedure and practice.<sup>4</sup> Military courts-

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<sup>1</sup> JOHN ALAN APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* vi (1954).

<sup>2</sup> Military commissions are a type of military tribunal.

<sup>3</sup> *MANUAL FOR COURTS-MARTIAL UNITED STATES* Part I para. 2(b) (2000 ed.).

<sup>4</sup> Everett and Silliman gave an excellent summary of the differences between a court-martial and a military commission:

If trial is to be by a general court-martial, the Military Rules of Evidence, which mirror the Federal Rules of Evidence and are set out in the Manual for Courts-Martial, would probably apply. The same rules of evidence would not apply, however, to the trial of a foreign offender by a military commission. Similarly, while a provision of the Geneva Convention states that a prisoner of war may be sentenced only by the same courts and according to the same procedure that would apply to persons belonging to the armed forces of the detaining powers, this provision applies only to crimes committed while a prisoner of war, and not for a violation of the law of war committed while a combatant. Finally, although the system of appellate review prescribed for the court-martial of a servicemember would also apply to a general court-martial of a foreign national for crimes against the law of war, it would not apply in a similar prosecution before a military commission. Rather, Congress is free to authorize a different appellate process, which would be subject to only very limited review in the federal courts.

Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 516–17 (1994). See also APPLEMAN, *supra* note 1, at x. For a thorough discussion of jurisdictional differences between military courts-martial and military commissions, as well as an excellent discussion of the history of both venues, see Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY L. 19.

martial are governed by the Manual for Courts-Martial,<sup>5</sup> and differ in many ways procedurally from the military tribunals ordered by the Bush administration.<sup>6</sup> Military tribunals are not governed by any one particular set of codified rules or procedures; rather, their practice is governed by the presidential or congressional order that created them.<sup>7</sup> Courts-martial are reviewable by the Court of Criminal Appeals of the particular branch of armed service under which the offense arises.<sup>8</sup> This decision is reviewable by the Court of Appeals for the Armed Forces,<sup>9</sup> composed of civilian justices who are appointed by the President for fifteen-year terms.<sup>10</sup> In turn, these decisions are ultimately reviewable by the United States Supreme Court.<sup>11</sup>

In stark contrast, the 2001 Order calling for the creation of military commissions (Military Commission Order) and that setting forth the procedures for the military commissions (Military Commission Rules) only provide for review by the appointing authority; military officers; a review panel of three military officers appointed by the Secretary of Defense (which may include commissioned civilians); the Secretary of Defense; and ultimately

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<sup>5</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.).

<sup>6</sup> Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001) [hereinafter Military Commission Order]. See also Department of Defense, Military Commission Order No. 1 at <http://www.defenselink.mil/news/Mar2002/d20020321.pdf> (Mar. 21, 2002 (on file with the North Carolina Journal of International Law and Commercial Regulation) [hereinafter Military Commission Rules] .

<sup>7</sup> Everett & Silliman, *supra* note 4, at 516–17.

<sup>8</sup> RULES FOR COURTS-MARTIAL Ch. XII, Rule 1203, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.); UNIFORM CODE OF MILITARY JUSTICE Ch. 47, Subchapter IX, § 866 Art. 66, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.).

<sup>9</sup> RULES FOR COURTS-MARTIAL Ch. XII, Rule 1204, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.); UNIFORM CODE OF MILITARY JUSTICE Ch. 47, Subchapter IX, § 867 Art. 67, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.).

<sup>10</sup> CLERK OF THE COURT, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 1 (Oct. 2001 ed.), at <http://www.armfor.uscourts.gov> (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>11</sup> RULES FOR COURTS-MARTIAL Ch. XII, Rule 1205, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.); UNIFORM CODE OF MILITARY JUSTICE Ch. 47, Subchapter IX, § 867a Art. 67a, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES (2000 ed.).

the President.<sup>12</sup> Thus, with this Military Commission Order, and the Military Commission Rules that followed, the Executive branch completely usurps all review power of Article III courts and allows the President, or the Secretary of Defense (if the President so authorizes) to stand in the place of the Supreme Court of the United States or any International Court in existence.<sup>13</sup>

The use of military commissions has precedent in both American and customary international law, and the ramifications of their use has been and may yet prove to be problematic for both domestic and international relations. Additionally, the Bush administration may have been incorrect in its determination of the status of some of the captured combatants, and thus may be setting injurious precedent for the armed forces of the United States. This comment will initially set forth the historical context in which military commissions came into use. Part I contains a discussion of presidential powers in times of crisis and the historical underpinnings of the doctrine of necessity.<sup>14</sup> Part II highlights important Supreme Court decisions regarding the use of military commissions by the United States.<sup>15</sup> Part III briefly summarizes the Geneva Conventions as background for Part IV, which discusses prisoner of war status and the laws of war.<sup>16</sup> Parts V and VI shed light on proposed and enacted legislation after September 11, 2001, focusing on military commissions and the use of force.<sup>17</sup> In conclusion, this article posits that while the use of military commissions as a venue has precedent in both U.S. and international law, the procedures set forth for the current commissions may be problematic in practice.<sup>18</sup>

## Historical Context

Military commissions as institutions were in existence before the adoption of the United States Constitution,<sup>19</sup> and are

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<sup>12</sup> Military Commission Rules, *supra* note 6, § 6(H)(3)–(6).

<sup>13</sup> *See id.* § 6(H)(6).

<sup>14</sup> *See infra* text accompanying notes 56–84.

<sup>15</sup> *See infra* text accompanying notes 85–114.

<sup>16</sup> *See infra* text accompanying notes 115–61.

<sup>17</sup> *See infra* text accompanying notes 162–278.

<sup>18</sup> *See infra* text accompanying notes 279–86.

<sup>19</sup> THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 111 (William S. Hein & Co., Inc. 1997) (1947).

sometimes referred to as the American Common Law War Courts.<sup>20</sup> They have been traced back to twelfth century England, where the Court of the Constable and the Marshal were "established for control of the King's Army, appeals of death penalties for murder committed out of the country, and the rights of prisoners taken in war."<sup>21</sup> Furthermore, "it has been long established that a victorious power may establish military tribunals to try offenders against the laws of war."<sup>22</sup> Thus, the system of justice using military commissions is not a new one, but is rather a forum that has been utilized and accepted for at least 200 years.<sup>23</sup>

After World War I, the right of the United States and the Allies to try war criminals before military tribunals was recognized by the peace treaties ending the war.<sup>24</sup> After World War II, each of the Allied Powers held military commissions following the principles of the Hague Rules of Land Warfare,<sup>25</sup> to accomplish several primary objectives:

- (1) To punish civilian and military leaders for waging aggressive war and thereby to retard war mongering and to increase the possibilities for a permanent peace;
- (2) To punish persons responsible for the commission of war crimes; [and]
- (3) To crystallize certain laws of humanity and thereby to deter the repetition of genocide and other oppressions of minority groups and aliens.<sup>26</sup>

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<sup>20</sup> *Id.*; *In re Yamashita*, 327 U.S. 1, 19 n.7 (1946).

<sup>21</sup> Harold L. Kaplan, *Constitutional Limitations on Trials By Military Commissions* 3 (1943) (unpublished Doctor of Juridical Science dissertation, New York University School of Law) (available in microfiche at the University of North Carolina School of Law Library) (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>22</sup> APPLEMAN, *supra* note 1, at 11. *See also* MacDonnel, *supra* note 4, at 27 (By 1780 the jurisdiction of military commissions to try enemy soldiers for war crimes had been established.).

<sup>23</sup> MacDonnel, *supra* note 4, at 27.

<sup>24</sup> *In re Yamashita*, 327 U.S. at 12 n.1 (citing Art. 128 of Treaty of Versailles, June 28, 1919; Art. 173 of Treaty of St. Germain, Sept. 10, 1919; Art. 157 of Treaty of Trianon, June 4, 1920).

<sup>25</sup> THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott ed., 3d ed. 1918), *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63-92 (Dietrich Schindler & Jiri Toman eds., 1981).

<sup>26</sup> APPLEMAN, *supra* note 1, at v (analysis of validity, fairness, and codification of

As a result of these commission trials and the Nuremberg hearings, the United States Supreme Court was flooded with hundreds of habeas corpus petitions.<sup>27</sup> Justice Jackson recused himself initially from deciding upon the writs, due to his participation in the first Nuremberg hearing.<sup>28</sup> The Court suddenly split on whether it had the authority to decide writs of habeas corpus in connection with detention prior to trial by military commission.<sup>29</sup> Justices Black, Douglas, Murphy, and Rutledge dissented virtually uniformly when the Court denied the petitions.<sup>30</sup> In June of 1950, the law pertaining to the writs was definitively established with *Johnson v. Eisentrager*.<sup>31</sup> This case may be said to stand for the proposition that as long as detention, trial, and punishment occur outside of the United States, then Article III courts in the United States will not review military trials of non-citizen terrorists through writs of habeas corpus.<sup>32</sup>

Justice Hugo Black gave voice to the division in the Court regarding the hearing of the writs of habeas corpus when he wrote that “military trials of civilians charged with crime, especially when not made subject to judicial review are so obviously contrary to our political traditions . . . [and are] a radical departure from our steadfast beliefs.”<sup>33</sup> I assert that Justice Black would thus

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rules used in the Nuremberg trials, primarily from the perspective of a trial lawyer who studied a great deal of international law).

<sup>27</sup> *Id.* at xi.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

*Johnson v. Eisentrager* can be interpreted to mean that Article III courts would not review by writ of habeas corpus the trials of aliens by American military tribunals sitting overseas so long as the trial, detention, and punishment have all taken place overseas. . . . Furthermore, if the alien is seized overseas by American forces for alleged violations of the law of war and brought to the United States for trial in a civil or military tribunal, he would be unable to contest jurisdiction, absent some heretofore unprecedented provision in an extradition treaty between the United States and the country where the seizure occurred.

Everett & Silliman, *supra* note 4, at 517–18.

<sup>32</sup> Everett & Silliman, *supra* note 4, at 517–18.

<sup>33</sup> *Duncan v. Kahanamoku*, 327 U.S. 304, 317 (1946) (noting, however, that “[o]ur question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces,

vehemently disagree with the current administration's promulgated rules, which make military tribunal decisions ultimately reviewable only by the President (or the Secretary of Defense if the President gives him the authority to do so).<sup>34</sup>

This historical split in the Court reflects a dichotomy of decision-making, a split personality in policy that runs deep in the American fabric, going well beyond the walls of the Supreme Court.<sup>35</sup> Just as the current administration characterizes al Qaeda, Taliban, and other extremist groups or sympathizers,<sup>36</sup> early American leaders also characterized slaves and Native Americans, through simplification and distortion.<sup>37</sup> If groups or individuals are systematically denied their humanity, then they can be denied their natural rights, or so the justification proceeds.<sup>38</sup> "Before there were 'war criminals,' there were 'barbarians,' 'heathens,' and 'savages' who did not qualify as equals in the arena of 'civilized warfare.'"<sup>39</sup> George Washington, in reference to Native American resistance to colonization, "wanted to establish a precedent of terror and believed that American national security demanded it: 'Our future security will be in their inability to injure us . . . and in the terror with which the severity of the chastisement they receive will inspire them.'"<sup>40</sup>

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or enemy belligerents, prisoners of war, or others charged with violating the laws of war."'). It is important to distinguish the fact that Duncan was a U.S. citizen tried by military tribunal when the courts of the United States were open and functioning; the case did not involve the trial of an alien.

<sup>34</sup> Military Commission Rules, *supra* note 6, § 6(H)(6).

<sup>35</sup> See PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 20 (2000).

<sup>36</sup> See Judith Shulevitz, *The Close Reader; There's Something Wrong With Evil*, N.Y. TIMES, Oct. 6, 2002, § 7, at 39.

<sup>37</sup> MAGUIRE, *supra* note 35, at 20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 22 (quoting RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING* 331 (1980)).

The expansions which followed Christopher Columbus's voyage to the Americas resulted in the destruction of great civilizations [such as] the Aztec, Inca, and Maya. The Indians of North America suffered a similar fate. Nearly all of God's creation including land and labour were turned into commodities in the capitalist sense of the word. People were kidnapped, bought, transported and sold. . . . At the start of the 20th century, nearly all of the world's non-Western peoples were under some form of Western domination, and remain hopelessly trapped in structures of extreme inequality which is not merely economic.



The idea of using terror to accomplish a desired end is not a new one. As illustrated above, it is one that was employed by the founding fathers of the United States themselves.<sup>41</sup> Theirs was a form of state-sponsored terrorism, one that was heralded as heroic and necessary in order to accomplish their notions of national security.<sup>42</sup> This historical account is not meant to be a justification for the use of such means, just an illustration as to why the United States may want to look in the mirror before pointing the finger at the root causes of violence and terror, or dismissing the motivations for terrorist acts as mere evil, a profoundly simplistic assessment at best.<sup>43</sup> This comment, however, is not meant to conduct an examination of the root causes of violence and terrorism, nor is it meant to be an examination of U.S. foreign policy. Rather, this issue is explored to add historical context to our discussion of the use of military commissions by the United States to try terrorists after September 11, 2001. Whatever the root causes may be, all should agree that the cycle of violence and terror must stop somewhere.<sup>44</sup> Actors must be held responsible for wanton destruction and targeting civilians, whatever their motives or justifications, and *whomever* the actors may be.

Just as terrorism must never be excused, so must genuine grievances never be ignored. True, it tarnishes a cause when a

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Eqbal Ahmad, *Culture of Imperialism*, at [http://www.geocities.com/CollegePark/Library/9803/eqbal\\_ahmad/imperial.html](http://www.geocities.com/CollegePark/Library/9803/eqbal_ahmad/imperial.html) (last visited Nov. 22, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>41</sup> MAGUIRE, *supra* note 35, at 22. Eqbal Ahmad pointed out the ironic dichotomy between the approach to state sponsored terrorism and to individual or group terrorism: "The official approach to terrorism is the need for the moral revulsions we feel against terror to be selective. We are to denounce the terror of those groups which are officially disapproved. But we are to applaud the terror of those groups of whom officials do approve." EQBAL AHMAD, *TERRORISM: THEIRS & OURS* 15 (Greg Ruggiero ed., 2001).

<sup>42</sup> MAGUIRE, *supra* note 35, at 22.

<sup>43</sup> See Shulevitz, *supra* note 36.

<sup>44</sup> Justice Murphy warned:

War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times, inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses in turn breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.

*In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting).

few wicked men commit murder in its name. But it does not make it any less urgent that the cause be addressed, the grievance heard, the wrong put right. Otherwise, we risk losing the contest for the hearts and minds of much of mankind.

We must act with determination to address, indeed solve, the political disputes and long-standing conflicts which underlie, fuel, and generate support for terrorism. To do so is not to reward terrorism or its perpetrators; it is to diminish their ability to find refuge or recruits, in any cause, any country. Only then can we truly know that the war on terrorism has been won—and the world made a safer, better, more just place.<sup>45</sup>

At the end of the nineteenth century, delegates gathered at the Hague for the International Peace Conference in a concerted effort to codify the rules of warfare and to come to consensus on methods to settle crises peacefully in order to prevent wars.<sup>46</sup> The delegates at the Hague attempted not only to come together on laws regulating war, but to codify rules on international relations in general.<sup>47</sup> An American delegate at the Hague, Joseph Choate, saw the Conference as a positive sign signaling the prospect of world peace.<sup>48</sup> “They bring together all the Nations in very close touch in the holy cause of humanity, and do much to promote the brotherhood of man.”<sup>49</sup> Unfortunately, despite the spirit with which the delegates at the Hague Conference came together, it was obvious that these laws of war did not apply to everyone all the time.<sup>50</sup> “Whether it was the U.S. Army fighting the Sioux on the

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<sup>45</sup> Press Release SG/SM/8518, United Nations, Terrorism is Global Threat, Says Secretary-General, but Measures Against it Must Not be Used to Justify Human Rights Violations (Nov. 21, 2002), <http://www.un.org/News/Press/docs/2002/SGSM8518.doc.htm> (statement by UN Secretary-General Kofi Annan upon receiving honorary degree at Tilburg University in the Netherlands) (on file with the North Carolina Journal of International Law and Commercial Regulation) [hereinafter Annan Statement].

<sup>46</sup> *About the United Nations: History of the UN*, at <http://www.un.org/aboutun/history.htm> (last visited Oct. 28, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation); see MAGUIRE, *supra* note 35, at 49.

<sup>47</sup> MAGUIRE, *supra* note 35, at 49.

<sup>48</sup> JOSEPH CHOATE, THE TWO HAGUE CONFERENCES 17 (1913).

<sup>49</sup> *Id.* “[P]erhaps thousands now living will see the day when war, as a means of settling international disputes, will be as generally condemned as the duel and slavery and the slave trade are to-day. Perhaps this also is another dream! But who can tell?” *Id.* at 44.

<sup>50</sup> MAGUIRE, *supra* note 35, at 52.

American Plains or the European armies fighting in Africa, western armies fought with few restraints in nineteenth-century colonial wars.”<sup>51</sup>

Some years after the first Hague Conference, after the dawning of a new century, world leaders came together and tried again. The Hague Conference of 1907 brought forty-four nations to the negotiating table.<sup>52</sup> After codifying the rules of war at the first Hague Conference, delegates at the second turned to such radical ideas as an international arbitration system.<sup>53</sup> This second Hague Conference further defined the rules of war and resulted in more nations committed to following them, but the ambitious plan for an international arbitration system was not fulfilled.<sup>54</sup> A third Hague conference was scheduled for 1914, but

[it] never convened, as hopes for international peace were dashed by a bullet in Sarajevo. . . . The outbreak of World War I in 1914 demonstrated how vulnerable international law was to the aggressive policies of a nation ready, willing, and able to employ military force. Once national survival was at stake, international law fell victim to military necessity . . . .<sup>55</sup>

This historical context is meant to illustrate that there is a disconnect in the precedent that the United States has set through some of its actions and the way that the United States has labeled the same types of actions when perpetrated by others. The ramifications of this disconnect have come into full view with the events of September 11, 2001.

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 68. See also CALVIN DEARMOND DAVIS, *THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE: AMERICAN DIPLOMACY AND INTERNATIONAL ORGANIZATION 1899–1914* (1975).

<sup>53</sup> MAGUIRE, *supra* note 35, at 68.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 69–70.

The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the law of war could be tried by military tribunals.

*In re Yamashita*, 327 U.S. 1, 12 n.1 (1946) (citing *Report of The Commission*, March 9, 1919, 14 AM. J. INT’L L. 95, 121 (1920)).

## I. Presidential Powers and the Doctrine of Necessity

Presidential powers during times of emergency, sometimes referred to as the Doctrine of Necessity, set the stage for a continuing push and pull between the President and Congress in the arena of war and foreign policy. A brief examination of presidential powers in this context serves as a parallel to an examination of the power to order military commissions to try war criminals.

The framers of the U.S. Constitution were not strangers to the consequences of tyranny and the abuse of power. James Madison warned, "[t]he accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>56</sup> Unfortunately, some have asserted, the balance of powers laid out in the U.S. Constitution have over the years become distorted into a presidential government, where the people expect the President to solve all of the nation's problems to the exclusion of Congress.<sup>57</sup>

Combining executive power and executive purpose often results in complex problems and equally, if not more, complex solutions.<sup>58</sup> One's ideas of how much power the President should have in acting by necessity, with national security interests in mind, are inescapably founded on individual views of foreign policy and international relations.<sup>59</sup> This notion of necessity has in the past provided a "wild card" allowing the President to act outside the narrow proscriptions of the Constitution in certain circumstances.<sup>60</sup> In 1810, Thomas Jefferson wrote from Monticello:

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<sup>56</sup> THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961); see also Larry Berman, *Presidential Powers and National Security*, in THE CONSTITUTION AND NATIONAL SECURITY: A BICENTENNIAL VIEW 117, 117 (Howard E. Shuman et al. eds., 1990).

<sup>57</sup> Berman, *supra* note 56, at 118.

<sup>58</sup> *Id.* at 122.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Ruling by necessity is not without its supporters, "although President Nixon boldly went where no predecessor had dared in declaring, 'when the President does it, that means it is not illegal.'" *Id.*

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus . . . absurdly sacrificing the end to the means.<sup>61</sup>

President Lincoln also expressed support for the underlying justifications of the doctrine of necessity in a letter to Albert Hodges, giving voice to the idea that the President should not be constrained by the Constitution if for some reason our national security demanded deviations from constitutional proscriptions:

I did understand . . . that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means, that government—that nation, of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assume this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if . . . I should permit the wreck of government, country and Constitution altogether.<sup>62</sup>

Further supporting the theory behind a general doctrine of necessity, Alexander Hamilton argued that “[t]he general doctrine, then, is that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument.”<sup>63</sup> He continued that the Executive’s duty is “to preserve peace till the war is declared; and

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<sup>61</sup> Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 418 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

<sup>62</sup> Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), in 10 THE COMPLETE WORKS OF ABRAHAM LINCOLN 65–68 (John G. Nicolay & John Hay eds., 1894).

<sup>63</sup> Letters of Pacifus: Written in Justification of the President’s Proclamation of Neutrality in ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 196 (Richard B. Morris ed., 1957).

in fulfilling this duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government . . . ."<sup>64</sup> In contrast, James Madison responded by arguing "that only 'foreigners and degenerate citizens among us, who hate our republican government,' could believe that an *inherent* Executive power existed."<sup>65</sup> Madison saw such a claim as equivalent to the tyrannical acts of the King of England.<sup>66</sup> "The claim to *inherent Executive power* is usually based on the President's own judgment of a crisis or emergency. For paranoid Presidents this may cause problems in constitutional balance . . . ."<sup>67</sup>

Article I of the U.S. Constitution delegates to Congress the power to declare war.<sup>68</sup> Article II provides that the President shall be Commander in Chief of the armed forces.<sup>69</sup> In 1973, the War Powers Resolution was enacted, setting forth specific guidelines regarding the balance of powers between Congress and the President in times of hostilities.<sup>70</sup> These guidelines did not end the tug-of-war for power between Congress and the President in the arena of war, one that continues to this day.<sup>71</sup>

<sup>64</sup> *Id.* at 197.

<sup>65</sup> Berman, *supra* note 56, at 123 (quoting James Madison's "Helvidius No. 1" in JAMES MADISON WRITINGS 537 (1999)).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 124.

Nixon reasoned that as holder of the Executive power, a President can go beyond his enumerated powers and take whatever steps that are necessary to preserve the country's security, even if his actions might be unconstitutional. This reasoning [may have] worked for Lincoln during the Civil War but could not pass muster during Watergate.

*Id.*

<sup>68</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>69</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>70</sup> War Powers Resolution, 50 U.S.C. ch. 33, §§ 1541-1548 (2000).

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

*Id.* § 1541(a).

<sup>71</sup> See Alison Mitchell, *Threats and Responses: The Congressional Debate; Lawmakers Make Their Cases as Votes on Use of Force Draw Near*, N.Y. TIMES, Oct. 8,

Congressman Lee Hamilton once said, in response to criticisms from Oliver North during a hearing before the House Select Committee:

A democratic government as I understand it, is not a solution, but a way of seeking solutions. It is not a government devoted to a particular policy objective, but a form of government which specifies the means and methods of achieving objectives. . . . If we support that process to bring about a desired end—no matter how strongly we may believe in that end—we have weakened our country, not strengthened it.<sup>72</sup>

After the Libyan air raid in 1986, republicans in the House of Representatives introduced a bill that would have allowed the President to respond independently and with deadly force to foreign terrorism, without consulting Congress, thus exempting the President from the War Powers Resolution.<sup>73</sup> Senator Jeremiah Denton (R-AL) indicated that the bill authorized the assassination of any head of state personally involved in any terrorist actions, stating that if Colonel Muammar el-Qaddafi “‘became deceased as the result of our counter-strike, that would have been within the intent of the bill.’”<sup>74</sup> “Libya provided a ‘best-case’ test of Presidential energy. Qaddafi constituted a symbol of international terrorism to most Americans. . . . The question falls squarely on one’s faith in the President’s defining national security interests.”<sup>75</sup>

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2002, at A14; see also Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (Oct. 16, 2002).

<sup>72</sup> Christopher Madison, *Another Hero*, 19 NAT’L J. 1940 (July 25, 1987).

<sup>73</sup> Berman, *supra* note 56, at 130. See A Bill to Protect United States Citizens from Terrorism (Anti-Terrorism Act of 1986), H.R. 4611, 99th Cong. (1986).

<sup>74</sup> Linda Greenhouse, *Tension Over Libya: Tough Words from Moscow; Bill Would Give Reagan a Free Hand on Terror*, N.Y. TIMES, Apr. 18, 1986, at A9. This type of result would likely violate the law of war, which does

not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in the consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

John Bassett Moore, A DIGEST OF INTERNATIONAL LAW § 1119 (1906).

<sup>75</sup> Berman, *supra* note 56, at 131.

The conflict between the President and Congress can be traced back to the Presidency of George Washington.<sup>76</sup> It is not always the President who causes controversy in trying to wield more power than has been given to him. Congress also occasionally refuses to follow clear Supreme Court precedent, perpetuating a political controversy within the American system of justice.<sup>77</sup>

War is a particularly contentious area in which all three branches of government struggle for authority and accountability. In *Woods v. Miller*, Justice Jackson, in his concurring opinion, spoke about his "explicit misgivings about war powers."<sup>78</sup> He asserted that the war power is the

most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.<sup>79</sup>

Justice Jackson's misgivings about war powers are relevant to any debate over how justice is best served when dealing with terrorists. The passions of the moment, driven by fear, anger, hatred, ignorance, or vindictiveness, can easily turn the blind eyes of justice into biased and unrelenting magnifying glasses, focused on whomever is unfortunate enough to get in their way. This is not to say that it is impossible for justice to be fair in times of crisis, merely that such times by their very nature call for added vigilance and care in carrying out justice. Such times also call for a careful examination and reflective discourse about what justice really means, or should mean, in a civilized and free world.

Turning from war powers and presidential authority in times of

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<sup>76</sup> Edwin Timbers, *Legal Lessons in National Security*, in *THE CONSTITUTION AND NATIONAL SECURITY: A BICENTENNIAL VIEW* 357, 357 (Howard E. Shuman et al. eds., 1990).

<sup>77</sup> *Id.*

<sup>78</sup> *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring).

<sup>79</sup> *Id.* (Jackson, J., concurring) (majority opinion holding that continuation of rent control after termination of hostilities was a valid exercise of the war power).



emergency to military commissions, both Congress and the President possess powers to create and authorize such venues.<sup>80</sup> Article I, section 8, clauses 1, 10, 11, 14, and 18 of the U.S. Constitution provide Congress with the authority to establish military commissions.<sup>81</sup> As the Commander-in-Chief of the armed forces,<sup>82</sup> the President possesses an inherent authority to appoint military commissions without the express authority of Congress.<sup>83</sup> “The shared power to create military commissions is unusual in a government predicated on the necessity of a separation of powers; it lies in what Justice Jackson called ‘a zone of twilight in which [the President] and Congress may have concurrent authority.’”<sup>84</sup> The next section of this comment will elaborate upon the Supreme Court’s confirmation of the President’s authority to establish military commissions, as well as illustrate some of the problems that may arise from the use of military commissions.

## II. Supreme Court Precedent; War and the Constitution

The United States Supreme Court has had a number of opportunities to “consider at length the sources and nature of the authority to create Military Commissions.”<sup>85</sup> For example, in 1942 the Court concluded that the Constitution did not require the use of a jury in military commission trials, nor did it require that violations of the law of war be tried in civil courts.<sup>86</sup> Further:

In another significant case resulting from the Allied victory in World War II, the Supreme Court ruled that the Articles of War granted jurisdiction both to general courts-martial and to military commissions to try, as a violation of the law of war, General Yamashita’s alleged failure to prevent the mistreatment of Filipinos by his troops. . . . The law of war was further utilized by the Court to sustain the jurisdiction of military

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<sup>80</sup> MacDonnell, *supra* note 4, at 20.

<sup>81</sup> *Id.*; U.S. CONST. art. I, § 8, cls. 1, 10–11, 14, 18.

<sup>82</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>83</sup> MacDonnell, *supra* note 4, at 20. “Under customary international law, the right of a military commander to establish and use military commissions to try suspected war criminals is inherent to his authority as a commander.” *Id.* at 22.

<sup>84</sup> *Id.* at 24 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

<sup>85</sup> THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra* note 19, at 111.

<sup>86</sup> *Ex parte Quirin*, 317 U.S. 1, 40 (1942).

government tribunals established in the American-occupied portion of West Germany, even when the defendants were civilians.<sup>87</sup>

While Congress had authorized the trial of enemy aliens by military commission, the Supreme Court noted that until there was an express suspension of the writ of habeas corpus by the Executive branch, U.S. federal courts retained the power and, in fact, the duty to examine the authority of military commissions if such petitions were made, but only in the case where commissions are held on U.S. soil or in a place where the United States exercises sovereignty.<sup>88</sup> The Supreme Court acknowledged in 1946 that the military tribunals' judgments and rulings were not reviewable by the Court.<sup>89</sup> The commissions at issue in the case of *In re Yamashita* were reviewable by military authorities as provided in the orders creating them, or as set forth in the Articles of War.<sup>90</sup> The military commissions that Congress had created did not provide for any review to the Supreme Court except in cases of writs of habeas corpus.<sup>91</sup> Four years later, the Court again acknowledged that it would not review military commission findings of fact.<sup>92</sup>

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<sup>87</sup> Everett & Silliman, *supra* note 4, at 514–15 (citations omitted).

<sup>88</sup> *In re Yamashita*, 327 U.S. 1, 9 (1946) (citation omitted). The Court notes that Congress,

in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to “define and punish . . . Offences against the Law of Nations . . .,” of which the law of war is a part, had by the Articles of War (10 U.S.C. §§ 1471-1593) recognized the “military commission” appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

*Id.* at 7.

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (“The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner.”).

<sup>92</sup> 78 AM. JUR. 2D *War* § 35 (2002) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Application of Yamashita*, 327 U.S. 1 (1946)).

The authority of military tribunals sanctioned by Congress for the prosecution and punishment of offenders against the laws of war extends to prosecution and punishment of enemy field commanders and other enemy combatants, and that authority continues after the cessation of hostilities between the forces of the United States and those of an enemy country, at least until peace has been officially recognized by treaty or proclamation of the political branch of the

If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.<sup>93</sup>

However, the Court did not say that military commission verdicts or procedures are not reviewable for constitutionality; nor did it say that the Supreme Court is without the authority to review the order itself creating the military commissions for constitutional violations. In fact, while the Court further recognized that it is not in the business of creating the laws of war, it stated that it will “respect them so far as they do not conflict with the commands of Congress or the Constitution.”<sup>94</sup> In 1942, in *Ex parte Quirin* the Supreme Court had occasion to consider a presidential order for military commissions<sup>95</sup> not unlike the current military order.<sup>96</sup> The

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government.

*Id.* (citing *Application of Homma*, 327 U.S. 759 (1946)).

<sup>93</sup> *In re Yamashita*, 327 U.S. at 9 (citations omitted).

<sup>94</sup> *Id.* at 16.

<sup>95</sup> *Ex parte Quirin*, 317 U.S. 1, 18–19 (1942) (“The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, . . . is in conformity to the laws and Constitution of the United States.”). The military order in question read as follows:

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, the President declared that “all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.” The Proclamation also stated in terms that all such persons were denied access to the courts.

*Id.* at 22–23 (citations omitted). The German saboteurs in *Quirin* were tried in Washington, D.C., giving the Article III courts jurisdiction to hear the habeas corpus petitions. It has been held that the authority of Article III courts to hear such petitions does not exist if the petitioner is an alien and the detention is outside of the United States, i.e. in Guantanamo Bay, Cuba. *Rasul v. Bush*, 215 F. Supp. 2d 55, 72–73 (D. D.C. 2002). The court in *Rasul* specifically held that Guantanamo Bay, Cuba was

Court maintained that nothing in the President's proclamation precluded the Supreme Court from determining whether the Constitution or the proclamation allowed the trial of the defendant by military commission.<sup>97</sup>

[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.<sup>98</sup>

Thus, while the current military order may not be found unconstitutional because it does not provide for review by the Supreme Court or any other Article III court, the Supreme Court, in the proper circumstances, would likely not refuse to hear a case challenging the constitutionality of a military commission decision (so long as the challenge is not based on disputed facts alone), and, of course, so long as the challenger had standing.

In *Madsen v. Kinsella* the Supreme Court specifically recognized presidential authority to create military commissions, absent any expressed congressional intent to the contrary.<sup>99</sup> The Court acknowledged that such commissions are “constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.”<sup>100</sup> Further, the Court in *In re Yamashita* stated that “the power to prosecute violations of the law of war . . . rests, not with the courts, but with the political branch of Government.”<sup>101</sup>

While the Court generally held that military commissions

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outside the sovereignty of the United States. *Id.* The court further held that under the precedent of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), “writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States,” serving as the basis for the dismissal of the petitioners’ claims. *Id.* The court did note, however, that “this opinion, too, should not be read as stating that these aliens do not have some form of rights under international law.” *Id.* at 73.

<sup>96</sup> See *infra* Part VI.

<sup>97</sup> *Quirin*, 317 U.S. at 25.

<sup>98</sup> *Id.*

<sup>99</sup> 343 U.S. 341, 348 (1952) (“[I]n the absence of attempts by Congress to limit the President’s power, it appears that, as Commander in Chief . . . he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.”).

<sup>100</sup> *Id.* at 346.

<sup>101</sup> *In re Yamashita*, 327 U.S. 1, 13 (1946).

could deviate procedurally from other Article III trials, not every Supreme Court justice agreed. In a particularly contentious dissent, Justice Murphy asserted that the due process clause of the Fifth Amendment applies to enemy belligerents in equal force as it does to U.S. citizens:

Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of Government, even the military, except under the most extreme and urgent circumstances.<sup>102</sup>

Would Justice Murphy view current terrorist threats and actions against the United States as sufficiently extreme and urgent? In regard to the trial at issue in *In re Yamashita*, Justice Murphy claimed that the charges were improper, that the accused was not given sufficient time to prepare a defense, that he was sentenced summarily to be hanged, that the basic rules of evidence did not protect the accused, and that there was a fundamental problem with the fact that the defendant was not charged with any personal participation or even knowledge of war crimes.<sup>103</sup> Murphy went on in his dissent to describe the trial of the defendant by military commission for acts of officers under his command as

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<sup>102</sup> *Id.* at 26–27 (Murphy, J., dissenting).

<sup>103</sup> *Id.* at 27–28 (Murphy, J., dissenting).

unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. *To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.*<sup>104</sup>

Justice Rutledge also dissented:

Not heretofore has it been held that any human being is beyond [the Fifth Amendment's] universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.<sup>105</sup>

Justices Rutledge and Murphy thus gave voice to an objection that is particularly applicable today, namely that the United States should be careful in choosing the means to carry out justice for its "enemies," lest those same "enemies" choose to follow its examples in carrying out their ideas of justice against it. Justice Rutledge cautioned that "It was a great patriot who said: 'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.'"<sup>106</sup>

Justice Murphy again dissented in *Homma v. Patterson*, warning of a result of a system of justice predicated on notions of

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<sup>104</sup> *Id.* at 28–29 (Murphy, J., dissenting) (emphasis added).

<sup>105</sup> *Id.* at 79 (Rutledge, J., dissenting).

<sup>106</sup> *Id.* at 81 (Rutledge, J., dissenting) (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Foner ed., 1945)).

revenge alone:

This nation's very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course.<sup>107</sup>

He further pointed out that the principles of justice codified in the U.S. Constitution are not "artificialities or arbitrary technicalities" but rather are the "very life blood of our civilization" and thus not to be forgotten in the heat of the moment when acting hastily on vengeful impulses.<sup>108</sup>

But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. . . . A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of dignity of the human personality and due process of law.<sup>109</sup>

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.<sup>110</sup>

The language cited above is relevant in the policy debate about the use of military commissions. However, it is important to note in this discussion of trying terrorists that the Supreme Court does not have jurisdiction to decide upon writs of habeas corpus filed by aliens who are held and tried outside of the United States:

We are cited to no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor

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<sup>107</sup> *Homma v. Patterson*, 327 U.S. 759, 759 (1946) (Murphy, J., dissenting).

<sup>108</sup> *Id.* at 760–61 (Murphy, J., dissenting).

<sup>109</sup> *Id.* (Murphy, J., dissenting).

<sup>110</sup> *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866).

does anything in our statutes.<sup>111</sup>

The majority of the Court, in *Johnson v. Eisentrager*, stated that there are in fact allowable distinctions among which constitutional protections will apply:

Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.<sup>112</sup>

Thus *Johnson v. Eisentrager* can be cited as authority for the proposition that Article III Courts should not afford trials to al Qaeda terrorists living outside of the United States who nonetheless travel to the U.S. to commit violations of the law of war. Rather, they would presumably be triable by military commissions: “[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.”<sup>113</sup>

The distinction between lawful and unlawful combatants (or belligerents) has therefore been important for the U.S. Supreme Court in determining who may be lawfully subject to trial by military commission.<sup>114</sup> The Geneva Conventions set the stage for these classifications, and the next section will briefly discuss the Conventions, leading to section IV, which will discuss the classification of unlawful combatants in the context of affording prisoner of war status. Classification among combatants is important because it will determine whether the prisoners captured as a result of the terrorist acts on September 11, 2001, or the

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<sup>111</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950). See also *Rasul v. Bush*, 215 F. Supp. 2d 55, 72-73 (D. D.C. 2002); *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 198 (4th Cir. Va. Jan. 8, 2003) (deciding upon writ of habeas corpus for American citizen labeled as an enemy combatant).

<sup>112</sup> *Eisentrager*, 339 U.S. at 768-69 (footnote omitted).

<sup>113</sup> *Id.* at 776.

<sup>114</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).



ongoing war on terrorism, will be triable by military commissions or whether they will have access to trial by Article III courts in the United States.

### III. The Geneva Conventions

This section provides background on the classification of prisoners captured in hostilities, setting forth an abbreviated overview of the Geneva Conventions. In 1949, delegates gathered at the Hague to codify the laws governing the treatment of prisoners and other persons during armed conflicts.<sup>115</sup> The results were codified as follows: the First Geneva Convention (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field); the Second Geneva Convention (Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea); the Third Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War); and the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War).<sup>116</sup> In 1977, the four Geneva Conventions were supplemented by two Protocols: the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.<sup>117</sup> With particular attention paid to prisoners of war, the Third Geneva Convention codified rules regarding the treatment of prisoners captured in conflict, rules which reflect a basic understanding of human rights and dignity.<sup>118</sup>

The Geneva Conventions are meant to apply in all cases of war or armed conflict between the High Contracting Parties,<sup>119</sup>

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<sup>115</sup> NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 3 n.4 (2d ed. 1999).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Fact Sheet: Status of Detainees at Guantanamo, from the White House Office of the Press Secretary, Office of Communications (Feb. 7, 2002), *available at* 2002 WL 191071.

<sup>119</sup> The Third Geneva Convention states that:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their

regardless of whether either of them has formally declared a state of war.<sup>120</sup> Furthermore, even if one of the parties to a conflict is not a party to the Conventions, those that are, nonetheless, must abide by its terms in the conflict, in relation to not only parties to the Conventions but in relation to those not parties to the Conventions.<sup>121</sup>

Following World War II, criticism of the Nuremberg trials "led to an article common to each of the four Geneva Conventions which requires each signatory to 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.'"<sup>122</sup> Everett and Silliman assert that the United States complied with this article "through enactment of the Uniform Code of Military Justice in 1950. Articles 18 and 21 of the Code refer to the use of general courts-martial as well as military commissions for the trial of offenses against the law of war."<sup>123</sup>

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respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population. Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Aug. 12, 1949, art. 127, T.I.A.S. No. 3364, 6 U.S.T. 3316, 98, 932 U.N.T.S. 13, 136 [hereinafter Geneva Convention].

<sup>120</sup> Geneva Convention, *supra* note 119, art. 2, 6 U.S.T. at 2-3, 932 U.N.T.S. at 136.

<sup>121</sup> *Id.*

<sup>122</sup> Everett & Silliman, *supra* note 4, at 511 (citing to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 4 Bivens 853; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 3250, 4 Bivens 853; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 3418, 4 Bivens 853; Geneva Convention Relative to the protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 4 Bivens 853; 10 U.S.C. §§ 801-940 (1988); 10 U.S.C. §§ 818, 821 (1988)) ("These Articles were preceded by similar Articles in the former Articles of War. Compare 10 U.S.C. §§ 1471-1593 (1941) with 10 U.S.C.A. §§ 801-946 (West 1994)").

<sup>123</sup> *Id.* at 511. The authors indicate that:

The purpose of this article is to explore a potential alternative forum to the International Tribunal for trying and punishing offenses against the law of nations. . . . In particular, the article addresses whether American military tribunals are a realistic alternative to a specially constituted tribunal when trying

#### IV. Prisoners of War; Unlawful Combatants & The Laws of War

As stated above in Part II, classification is important in determining whether captured combatants will be subject to trial by military commission or whether they will have access to trial by Article III courts in the United States. The Third Geneva Convention sets the groundwork for determining this classification, and will be discussed in detail in this section.

Apprehending and trying war criminals is undoubtedly an important aspect of armed conflicts, equally as important as procedures adopted to engage and ideally defeat the enemy.<sup>124</sup> Further, it has been recognized that congressional power includes the ability to mandate the trial by military commission of these war criminals.<sup>125</sup>

The Geneva Convention Relative to the Treatment of Prisoners of War (the Third Geneva Convention) indicates that:

Prisoners of war, in the sense of the present Convention, are persons belonging to *one* of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who

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such offenses. For example, could an American military commander deployed with his forces to another country in a peacekeeping or peace enforcement operation prosecute a Saddam Hussein or a General Aaidid? The answer is that he can, and there is historical precedent for the use of military commissions or other military tribunals for this purpose.

*Id.* at 510.

<sup>124</sup> 78 AM. JUR. 2D War § 35 (2002) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

<sup>125</sup> *Id.* (citing *Application of Yamashita*, 327 U.S. 1 (1946)).

profess allegiance to a government or an authority not recognized by the detaining power.<sup>126</sup>

Under customary international law, the capturing party to the hostilities must make individual determinations about the status of those persons captured,<sup>127</sup> presumably to prevent innocent civilians from being caught up in the process unnecessarily, or to ensure that those who are deserving of the protections of the Geneva Conventions receive them. Both of these goals would be thwarted if one presumed to be able to classify all who are to be captured in the future without any individualized determinations whatsoever. "No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or a bandit."<sup>128</sup>

"Partisans" are soldiers who may be detached from their regular unit or main body for the purpose of infiltrating enemy territory, but are armed and wear the uniform of their army, and are thus entitled to prisoner of war status if captured.<sup>129</sup> On the other hand,

[m]en, or squads of men, who commit hostilities, . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, . . . such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.<sup>130</sup>

Customary international law<sup>131</sup> further indicates that hostilities

<sup>126</sup> Geneva Convention, *supra* note 119, art. 4, 6 U.S.T. at 4-5, 972 U.N.T.S. at 138 (emphasis added).

<sup>127</sup> Moore, *supra* note 74, at § 1109(52).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* § 1109(81).

<sup>130</sup> *Id.* § 1109(82).

<sup>131</sup> "Customary international law refers to the legal obligation created by the 'conjunction of a general practice of states with states' belief that they are legally obliged to adhere to the practice." J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1070 n.9 (2002) (quoting A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 2 (1997)). Newton discussed the evolution of international criminal law:

[I]nternational criminal law evolved from interactions between sovereign states. International law codifies specific offenses through treaties and also recognizes crimes based upon violations of customary international law. . . . [I]nternational criminal law defines offenses as "a result of universal

must be commissioned by a state in order to bring the combatants into the protection of the law of nations.<sup>132</sup> A primary focus of this requirement is the wearing of uniforms, which enables combatants to distinguish between civilians and belligerents on the battlefield. The requirement of state commission allows accountability and some degree of order, if such can be accomplished in war:

If war were to be waged by private parties, operating according to the whims of individual leaders, every place that was seized would be sacked and outraged; and war would be the pretence to satiate private greed and spite. Hence, all civilized nations have agreed in the position that war to be a defence to an indictment for homicide or other wrong, must be conducted by a belligerent state, and that it can not avail voluntary combatants not acting under the commission of a belligerent. But free-booters, or detached bodies of volunteers, acting in subordination to a general system, if they wear a distinctive uniform, are to be regarded as soldiers of a belligerent army.<sup>133</sup>

The distinction between those fighting under the orders of a nation and guerilla bands, even if in uniform, is that the latter are considered outlaws, punishable as robbers and murderers; whereas the former are considered part of the forces of the belligerent nation and thus entitled to protections as such.<sup>134</sup> The law of war was clearly violated when the World Trade Center, and most importantly civilians, became a target for terrorist actions:

The measure of permissible devastation is to be found in the strict necessities of war. . . . Destruction . . . is always illegitimate when no military end is served, as is the case when churches or public buildings, not militarily used and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town.<sup>135</sup>

If waging war on the United States were indeed the terrorists' motive, while the Pentagon could arguably be considered a proper military target, the World Trade Center could not. It has been

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condemnation of those activities and general interest in cooperating to suppress them." Accordingly, any state has jurisdiction to punish international crimes.

Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 5-6 (1996) (citations omitted).

<sup>132</sup> Moore, *supra* note 74, at § 1109.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citations omitted).

<sup>135</sup> *Id.* at § 1113.

theorized by some that the fourth plane that crashed in rural Pennsylvania was intended for the destruction of the White House.<sup>136</sup> Arguably, the White House could be considered a military target, for while there are certainly civilians present in and around the White House; it is the residence and office of the Commander-in-Chief of the Armed Forces of the United States. However, this is subject matter for another debate.

While it is apparent that under the Third Geneva Convention individuals taken in conflict by their enemies may be classified as prisoners of war and afforded all the protections and privileges that come with such a classification, others may not. "By the law and practice of civilized nations, enemies' subjects taken in arms may be made prisoners of war; but every person found in the train of an army is not to be considered as therefore a belligerent or an enemy."<sup>137</sup> There are always those in the middle of a war, whether by accident or on purpose, who may neither expect nor reasonably could be considered belligerents, such as innocent civilians who are captured due to their proximity to those fighting in the conflict.<sup>138</sup>

Those who violate the laws of war are sometimes said to have committed war crimes, and their trial for such offenses depends on their classification as well as the time that they are alleged to have committed the offense. "The term 'war crimes' was first widely used during and after World War I. More often than not, war crimes accusations were propaganda designed to fuel the moral outrage necessary for modern war."<sup>139</sup> In 1996, the United States Congress codified the War Crimes Act, sending a message to the world that citizens and troops alike from the United States would be subject to trial and punishment for war crimes.<sup>140</sup>

The War Crimes Act of 1996 provides for criminal penalties, including the death penalty, where any person, whether inside or outside the United States, commits a war crime, provided that the person committing such war crime or the victim of such war

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<sup>136</sup> See Thomas Geraghty, *The Criminal-Enemy Distinction: Prosecuting a Limited War Against Terrorism Following the September 11, 2001 Terrorist Attacks*, 33 MCGEORGE L. REV. 551, 552 (2002); George Kuempel, *Pilot Would Have Protected Plane, Sister-in-law Says*, DALLAS MORNING NEWS, Sept. 13, 2001.

<sup>137</sup> Moore, *supra* note 74, at §1127.

<sup>138</sup> *Id.*

<sup>139</sup> MAGUIRE, *supra* note 35, at 71.

<sup>140</sup> 18 U.S.C. §§ 2241(a), 2241(b), 2241(c) (2000).

crime is a member of the Armed Forces of the United States or a national of the United States. As used in the applicable statute the term "war crime" means any conduct (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) PROHIBITED BY Article 23, 25, 27 or 28 of the Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict . . . .<sup>141</sup>

The question remains whether those selected to be tried by military commission will be accused of war crimes, or whether their violations will be characterized solely as terrorist actions. The Bush administration has thus far indicated through its rhetoric that what occurred on September 11 was terrorism, not an act of war. The United States set up a detention center in Guantanamo Bay, Cuba to hold prisoners captured in the war on terrorism.<sup>142</sup> In February of 2002, President Bush declared the detainees to be "unlawful combatants."<sup>143</sup>

[Unlawful combatants] was the term applied by the Supreme Court in its 1942 decision upholding military tribunals for a group of German saboteurs who had slipped into the United States. In that ruling, the justices said spies and saboteurs were violators of the law of war and so were not entitled to prisoner-of-war protections.<sup>144</sup>

The Bush administration has therefore aptly chosen terminology in its classification of prisoners captured in the war on terrorism, consistent with U.S. Supreme Court precedent allowing

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<sup>141</sup> 78 AM. JUR. 2D *War* § 10 (2002) (citing 18 U.S.C.A. §§ 2441(a), 2441(b), 2441(c)).

<sup>142</sup> See *Life in a Guantanamo Cell*, BBC News: Americas (Feb. 7, 2002), <http://news.bbc.co.uk/1/hi/world/americas/1766037.stm> (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>143</sup> Fact Sheet: Status of Detainees at Guantanamo, from the White House Office of the Press Secretary, Office of Communications (Feb. 7, 2002), *available at* 2002 WL 191071.

<sup>144</sup> William Glaberson, *A Nation Challenged: The Justice System; Critics' Attack On Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1.

military commission trials for actors thus labeled.<sup>145</sup> On the other hand, an obvious concern arises that the United States may be setting a dangerous precedent for its own troops who may be captured in conflicts on foreign soil, if the captors deemed the actions of those troops to be illegitimate.<sup>146</sup>

Classifying the prisoners captured in Afghanistan and elsewhere as a result of the war on terrorism as "unlawful combatants" is a potentially dangerous line to draw in the current circumstances. The Taliban was in control of Afghanistan when the al Qaeda flourished there, though it was not recognized as a legitimate government by the United States.<sup>147</sup> I would thus argue that Taliban combatants could fall under the third category of prisoners of war, namely "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power."<sup>148</sup> Apparently, this third category of prisoners of war has not even been mentioned by the administration or anyone commenting on the classifications of those held in Cuba. Instead, the second provision is the one that is routinely cited – mistakenly, I believe, as it is the only provision that must be satisfied in order for a detainee to be afforded prisoner of war status. The Third Geneva Convention clearly states that only one of the three provisions must be satisfied in order to obtain prisoner of war status.<sup>149</sup>

With the announcement that the detainees would not be afforded prisoner of war status, the administration claimed its actions were consistent with the spirit of the Geneva Conventions.<sup>150</sup> President Bush announced that the Taliban would

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<sup>145</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>146</sup> Glaberson, *supra* note 144; see also *supra* text accompanying notes 106–11.

<sup>147</sup> *Taliban Reach Zenith? Taliban Regime May Have Reached Its Height of Power in Afghanistan*, 85 NATIONAL DEFENSE 10 (Oct. 1, 2000); Imtiaz Gul, *Western Diplomats Meet Afghan Taliban Amidst Hopes of Seeing Detainees Again*, DEUTSCHE PRESS-AGENTUR, Aug. 28, 2001.

<sup>148</sup> Geneva Convention, *supra* note 119, at art. 4, 6 U.S.T. at 4–5, 972 U.N.T.S. at 138.

<sup>149</sup> *Id.*

<sup>150</sup> Statement by Ari Fleischer, Press Secretary, the White House Office of Communications (Feb. 7, 2002), available at 2002 WL 191074 [hereinafter Fleischer Statement] ("Consistent with American values and the principles of the Geneva Convention, the United States has treated and will continue to treat all Taliban and al Qaeda detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention."). Joseph Choate, American representative at the Hague



be afforded protections under the Geneva Conventions, although not prisoner of war status, because Afghanistan is a party to the Conventions (despite the fact that the United States did not recognize the Taliban as the legitimate Afghan government).<sup>151</sup> The administration stated that those captured, in order to be afforded prisoner of war status, would have had to have met the four conditions set forth in the second provision discussed above:

They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. . . . [T]hey have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda. Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty. . . . The president has maintained the United States' commitment to the principles of the Geneva Convention, while recognizing that the Convention simply does cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.<sup>152</sup>

The administration thus failed to acknowledge other provisions of the Geneva Conventions that might apply to Taliban or al Qaeda fighters, instead only applying one of the provisions then going on to focus on the fact that war crimes had likely been committed, which really has nothing to do with determining prisoner of war status. When questioned about how the United States could make such a distinction based on uniforms and carrying open arms and still protect our special forces who often do neither,<sup>153</sup> Mr. Fleischer responded, “[t]he terms of the Geneva

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Conferences, reflected that the accomplishments at the First Hague Conference, including the codification of the laws and customs of war (e.g. regarding the classification of belligerents) were “in the spirit of an enlarged humanity” and contributed to the “practical promotion of the cause of peace.” CHOATE, *supra* note 48, at 12–13.

<sup>151</sup> Fleischer Statement, *supra* note 150.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Convention apply to all, and those terms speak for themselves.”<sup>154</sup> This answer, if it can be termed as such, is highly problematic and illustrates the reason for concern that the current administration is setting a precedent that could potentially threaten the safety of our armed forces, now and in future conflicts.

The administration further sought to minimize the implications of its decision, focusing the attention of the public on arguably trivial privileges afforded to prisoners of war:

The detainees will receive much of the treatment normally afforded to POWs by the Third Geneva Convention. However, the detainees will not receive some of the specific privileges afforded to POWs, including: access to a canteen to purchase food, soap and tobacco; . . . and the ability to receive scientific equipment, musical instruments, or sports outfits.<sup>155</sup>

The decision to categorize the detainees as unlawful combatants has far-reaching implications beyond whether those captured will be able to access sports outfits. Customary international law and the law of war both draw distinctions between unlawful and lawful combatants.<sup>156</sup> “Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>157</sup> Thus the administration made all detainees subject to trial by military commission in distinguishing them as unlawful rather than lawful combatants.

The United States War Department (predecessor to the U.S. Department of Defense) promulgated the Rules of Land Warfare

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<sup>154</sup> *Id.*

<sup>155</sup> Fact Sheet: Status of Detainees at Guantanamo, from the White House Office of the Press Secretary, Office of Communications (Feb. 7, 2002), *available at* 2002 WL 191071.

<sup>156</sup> *Ex Parte Quirin*, 317 U.S. 1, 30–31 (1942).

<sup>157</sup> *Id.* at 31. Additionally, Article 102 of the Third Geneva Convention indicates that prisoners of war may only be tried by courts-martial or civilian courts. Geneva Convention, *supra* note 119 at art. 102, 6 U.S.T. at 74. Further, Article 103 mandates that if prisoners of war are detained while awaiting trial, which is only allowed if national security demands it, “in no circumstances shall this confinement exceed three months.” Geneva Convention, *supra* note 119 at art. 103, 6 U.S.T. at 74. Thus by denying prisoner of war status to those held at Guantanamo Bay, the Bush administration has effectively skirted the Third Geneva Convention’s policies regarding indefinite detentions.

to guide the Army in the practical aspects of dealing with combatants taken prisoner during conflict.<sup>158</sup> In the 1940 Rules of Land Warfare, Paragraph 9 distinguishes between lawful and unlawful belligerents, with the defining characteristic being the carrying of arms openly and the wearing of a fixed and distinctive emblem.<sup>159</sup>

Paragraph 351 provides that “men and bodies of men, who, without being lawful belligerents” “nevertheless commit hostile acts of any kind” are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And paragraph 352 provides that “armed prowlers . . . or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war.” . . . Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear “fixed and distinctive emblems.”<sup>160</sup>

All in all, it is relatively clear that following Supreme Court precedent, the Third Geneva Convention, the Rules of Land Warfare, and customary international law, there is a class of fighters, namely unlawful combatants, who have been deemed not to deserve the protections of the Third Geneva Convention through classification as prisoners of war. Therefore, if the Taliban and al Qaeda fighters have accurately been described as unlawful combatants they should not be afforded prisoner of war status and are thus subject to trials by lawfully convened military commissions. In contrast, I assert that under the third category of the Third Geneva Convention, Taliban fighters may have been afforded prisoner of war status; and that in its definition of

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<sup>158</sup> UNITED STATES WAR DEPARTMENT, RULES OF LAND WARFARE (1940).

<sup>159</sup> *Quirin*, 317 U.S. at 34.

<sup>160</sup> *Id.* at 34–35. Article 5 of the Third Geneva Convention indicates that if there is any doubt as to the status of a combatant under Article 4, that “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Geneva Convention, *supra* note 119 at art. 5, 6 U.S.T. at 7–8. *But see* Hamdi v. Rumsfeld, 2003 U.S. App. LEXIS 198 (4th Cir. Va. Jan. 8, 2003) (holding that the Geneva Convention is not a self-executing instrument and thus challenges regarding Article 5 should be vindicated through diplomatic means).

unlawful combatants, the Bush administration could be setting a dangerous precedent for U.S. forces.

[T]he danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it—and thereby corroding the vessel of democratic government from within. Whether the question involves the treatment of minorities here in the West, or the rights of migrants and asylum seekers, or the presumption of innocence or the right to due process under the law—vigilance must be exercised by all thoughtful citizens to ensure that entire groups in our societies are not tarred with one broad brush and punished for the reprehensible behaviour of a few.<sup>161</sup>

## V. Proposed Legislation After September 11, 2001

This section will highlight the attempts of a few members of Congress to establish procedures for military commissions to try terrorists captured after September 11, 2001. It is significant that some members of Congress saw fit to act in this arena, in anticipation of presidential action, illustrating the tug-of-war between Congress and the President that so often occurs in the “zone of twilight” where the two branches have concurrent authority to act.<sup>162</sup>

### A. *Military Commission Procedures Act of 2002*

In February 2002, Senators Specter (R-PA) and Durbin (D-IL) introduced a bill entitled the Military Commission Procedures Act of 2002,<sup>163</sup> intended to respond to the President’s Military Commission Order of November 13, 2001.<sup>164</sup> The two senators thought that it was Congress’s duty to determine the proper trial procedures for military commissions, pursuant to Article I, section 8 of the Constitution.<sup>165</sup>

We have already legislated in part, delegating to the President

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<sup>161</sup> Annan Statement, *supra* note 45.

<sup>162</sup> See *supra* Part I.

<sup>163</sup> Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002).

<sup>164</sup> See *infra* Part VI.

<sup>165</sup> 148 CONG. REC. S733-01 (daily ed. Feb. 13, 2002) (statement of Sen. Specter regarding S. 1937, a “bill to set forth certain requirements for trials and sentencing by military commissions, and for other purposes; to the Committee on Armed Services”) [hereinafter Specter Statement].

the authority to establish military tribunals “by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”<sup>166</sup>

The senators were especially concerned with the lack of appellate review in the Military Commission Order,<sup>167</sup> viewing this power stripping as suspending the right to a writ of habeas corpus, an unconstitutional act unless necessary in times of rebellion or invasion.<sup>168</sup> Thus, the bill introduced allows for a convicted defendant to petition the Supreme Court for certiorari.<sup>169</sup> The bill also calls for the preservation of the right to counsel, as consistent with the Uniform Code of Military Justice.<sup>170</sup>

Perhaps as a gesture of compromise, the bill indicates that there would be no *Miranda* rights for suspects being interrogated.<sup>171</sup> The senators acknowledged the potential criticism of this provision, but also recognized the importance of the questioning soldiers’ safety as well as the need to elicit information that could potentially thwart further terrorist attacks.<sup>172</sup> Though unclear how *Miranda* warnings jeopardize the safety of interrogators, it is plausible to assume that the warnings may hinder information gathering. Senator Specter further stated that he agreed with the President’s decision not to afford al Qaeda or Taliban members prisoner of war status, noting that they are terrorists who murder innocent civilians.<sup>173</sup> He concluded by calling for a minimum of basic due process rights for those tried

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<sup>166</sup> *Id.* (quoting 10 U.S.C. § 836 (2000)).

<sup>167</sup> The President’s Military Commission Order, in section 7, seems to preclude review by any court in the world, and in section 4(c)(8), it is indicated that at a minimum, “submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.” Military Commission Order, *supra* note 6. See also *infra* Part VI.

<sup>168</sup> Specter Statement, *supra* note 165, see also U.S. CONST. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the Public Safety may require it.”).

<sup>169</sup> Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Specter Statement, *supra* note 165.

<sup>173</sup> *Id.*

by military commission, but no more than the minimum.<sup>174</sup> Senator Durbin indicated that the purpose of the bill was to protect the most basic rights of defendants and to ensure that the military commissions were to be used only in the most narrow and necessary circumstances.<sup>175</sup>

While this bill was set forth in the Senate to propose rules and regulations that should be followed by the military commissions; it acknowledged that the commissions were already a foregone conclusion, despite the lack of a declaration of war on the part of Congress.<sup>176</sup> It provides for trial by military commission of non-citizens whom the President determines

(1) there is a reason to believe that the individual, at the relevant times, (A) is or was a member of the organization known as al Qaeda; (B) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (C) has knowingly harbored one or more individuals described in subparagraph (A) or (B); and (2) it is in the interest of the United States that such individual be subject to trial by military commission on such charge.<sup>177</sup>

The bill further calls for a unanimous vote for a guilty verdict regarding a capital offence punishable by death, and a two-thirds vote for a finding of guilty on other offenses.<sup>178</sup> The primary difference between this bill and the Military Commission Rules promulgated by the Defense Department<sup>179</sup> is that this bill provides for an appeal to the Court of Appeals for Military Commissions (a new court established by the bill), and ultimate review by the Supreme Court of the United States.<sup>180</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> 148 CONG. REC. S733-01 (daily ed. Feb. 13, 2002) (statement of Sen. Durbin regarding S. 1937, a "bill to set forth certain requirements for trials and sentencing by military commissions, and for other purposes; to the Committee on Armed Services") [hereinafter Durbin Statement].

<sup>176</sup> Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Military Commission Rules, *supra* note 6; *see also infra* Part VI.

<sup>180</sup> S. 1937.

*B. Foreign Terrorist Military Tribunal Authorization Act of 2001*<sup>181</sup>

In December of 2001, Representative Jane Harman (D-CA) introduced this bill “[t]o authorize the President to convene military tribunals for the trial [of those] apprehended in connection with the September 11, 2001, terrorist attacks against the United States.”<sup>182</sup> The bill provides the President with authority to “convene military tribunals for the trial of individuals subject to this Act who are charged with offenses arising from” the attacks.<sup>183</sup> The bill specifies that such tribunals may only be held outside of the United States, and also contains a sunset provision of December 31, 2005.<sup>184</sup>

The Act would apply to individuals who are not citizens of the United States or lawfully admitted alien permanent residents, and who are apprehended outside of the United States.<sup>185</sup> Similar to the Military Commission Procedures Act, this bill preserves the right of a petition for habeas corpus.<sup>186</sup>

Both of the proposed legislations set forth above, as introduced into Congress, proved to be not too far off from the Military Commission Order that was eventually set forth by the President.<sup>187</sup> A common provision in all three states that only non-U.S. citizens shall be tried by any military commission.<sup>188</sup> A provision common in both of the proposed acts, one noticeably lacking in the President’s Military Commission Order, is the preservation of the right of habeas corpus, a right that may only be suspended during invasions or rebellions.<sup>189</sup> The next section of this comment will examine the President’s Military Commission Order in detail.

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<sup>181</sup> H.R. 3468, 107th Cong. (2001).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at § 2(a).

<sup>184</sup> *Id.* at §§ 2(b), 2(d).

<sup>185</sup> *Id.* at § 3.

<sup>186</sup> *Id.* at § 5.

<sup>187</sup> See *infra* Part VI(B).

<sup>188</sup> H.R. 3468, 107th Cong. § 3; Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002).

<sup>189</sup> H.R. 3468, 107th Cong. § 5.

## VI. Executive and Legislative Enactments After September 11, 2001

### A. *Authorization for Use of Military Force*<sup>190</sup>

Just seven days after the terrorist attacks on the World Trade Center and the Pentagon, an authorization for the use of military force was passed<sup>191</sup> pursuant to the War Powers Resolution.<sup>192</sup> The Authorization provides that the

President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>193</sup>

### B. *Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*<sup>194</sup>

The White House issued a Military Commission Order on November 13, 2001, regarding the "detention, treatment and trial of certain non-citizens in the war against terrorism."<sup>195</sup> The Military Commission Order defines those individuals subject to it

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<sup>190</sup> S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

<sup>191</sup> *Id.*

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.

*Id.*

<sup>192</sup> 50 U.S.C. § 1541 (2001).

<sup>193</sup> S.J. Res. 23.

<sup>194</sup> Military Commission Order, *supra* note 6.

<sup>195</sup> *Id.*



as certain non-citizens whom the President determines in writing that

(1) there is reason to believe that such individual, at the relevant times, . . . (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore[e], that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy . . .<sup>196</sup>

The language of this section is potentially overly broad, as its scope covers an enormous number of people who would not normally be considered terrorists by conventional standards. Furthermore, there is no definition of “international terrorist” or “international terrorism” anywhere in the Military Commission Order, highly problematic in the subjectivity this allows in defining those who are terrorists.<sup>197</sup> For example, what if a foreign manufacturer decided that it no longer wanted to import widgets made in the United States, a decision that has a negative impact on the U.S. economy? Will this manufacturer then fall under the terminology of this Military Commission Order and thus be considered a terrorist? What about Saudi Arabia’s Crown Prince Abdullah’s proposal for peace between Israel and the Palestinians,<sup>198</sup> a proposal that potentially would change U.S. foreign policy? Will the Saudi Prince now be subject to a trial before a military tribunal? What about protestors who converge on Washington to criticize U.S. foreign policy?<sup>199</sup> If one of these protestors is a non-citizen, and her aim is to adversely affect U.S. foreign policy, a highly subjective standard, then arguably this person too would come within the language of the President’s Military Commission Order. It may seem ridiculous and far-fetched to suggest that these examples are viable ones, a parade of horrors so to speak. However, it is important for legal scholars

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<sup>196</sup> *Id.*

<sup>197</sup> Daniel A. Rezneck & Jonathan F. Potter, *Military Tribunals, the Constitution, and the UCMJ*, 2002 FED. CTS. L. REV. 3, 3–4 (2002). “Perhaps the drafters, for reasons of state and diplomacy, elected not to include a definition. Since some of our coalition partners believe that ‘one man’s terrorist is another man’s freedom fighter,’ avoiding a definition may avoid rocking the boat in which all are presently embarked.” *Id.*

<sup>198</sup> See Serge Schmemmann, *Saudi’s Idea Stirs Hope in Israel and Abroad*, N.Y. TIMES, Feb. 26, 2002, at A8.

<sup>199</sup> See Karen Crummy, *War on Terrorism; Protestors Call for Peace—Activists Blame Attacks on U.S. Policy*, BOSTON HERALD, Sept. 30, 2001, at 5.

to check drafting for overly broad and/or vague language so as not to punish innocent people, or to cast a net that is so big that it catches everyone in it.

The Bush administration is acting with proper motive, at least one presumes, with this Military Commission Order. However, it is not a far stretch to see why the language used may worry some civil libertarians. Should the citizens of the United States and those of a broader global community just sit back and hope that the Bush administration will use their powers wisely and in ways that do not offend our conscience? Some would say that the most patriotic thing to do would be to throw our full support behind anything that our leaders promulgate. Others, however, would argue that patriotism is about having your voice be heard, no matter what you have to say, whether you are a U. S. citizen or not.

Further examining the Military Commission Order, Section 7 contains provisions regarding the relationship of the order to other laws and forums.<sup>200</sup>

With respect to any individual subject to this order – (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.<sup>201</sup>

This provision indicates that any individual detained under this Military Order has absolutely no redress in any court in the world for any wrongful acts of his captor. This result seems highly problematic and overly limiting. Is the President suspending the writ of habeas corpus? White House Counsel Alberto Gonzales acknowledged that the Military Commission Order could not and did not suspend the writ of habeas corpus, thus leaving an opening for a challenge to the jurisdiction of a military commission in an Article III court.<sup>202</sup> Senator Durbin expressed his displeasure with

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<sup>200</sup> Military Commission Order, *supra* note 6, at 57835.

<sup>201</sup> *Id.*

<sup>202</sup> Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, November 30, 2001. Contrary to what is actually set out in the order, namely that the President has ultimate review authority over military commissions, Gonzales states:

the Military Commission Order, wary of its legal and policy grounds: “Many commentators also raised legitimate concerns that the [a]dministration’s use of military tribunals could potentially undermine our long-held foreign policy of criticizing other nations’ reliance on such tribunals.”<sup>203</sup> Senator Durbin was disappointed that Congress was not consulted in any manner prior to the release of the Military Commission Order.<sup>204</sup>

The Constitution provides executive powers to the President, not exclusive powers. Our Nation remains strong only if the co-equal branches of government work together. Any proceeding that takes place under President Bush’s order will have to withstand the test of legal scrutiny for years to come. But more importantly, it will also have to pass the scrutiny of our citizens at home and of our friends and enemies abroad who are watching to see how the greatest democracy in history carries out justice.<sup>205</sup>

Criticism also came from Mary Robinson, the United Nations Human Rights Commissioner, who said that the planned military commissions “skirt democratic guarantees.”<sup>206</sup> She further pointed out that democratic safeguards must be preserved even in times of crisis.<sup>207</sup> “She said that the Sept. 11 terrorist attacks were crimes against humanity meriting special measures but said that the plan for secret trials was so overly broad and vaguely worded that it threatened fundamental rights.”<sup>208</sup>

In a letter originating at Yale Law School, addressed to

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The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission’s jurisdiction through a habeas corpus proceeding in a federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.

*Id.* It is worth noting that Gonzales is talking about Article III review if the military commissions are held in the United States, and he says nothing about the lack of Article III review for military commissions held outside of the United States.

<sup>203</sup> Durbin Statement, *supra* note 175.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Elizabeth Olson, *World Briefing United Nations: Rights Official Criticizes U.S. Tribunal Plan*, N.Y. TIMES, Dec. 8, 2001, at A6.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

Senator Leahy (D-VT), some 300 law professors protested President Bush's military tribunal order, asserting, "the tribunals are 'legally deficient, unnecessary and unwise.'"<sup>209</sup> The professors, representative of numerous institutions and political ideals, stated that "the tribunals as outlined so far would violate the separation of powers, would not comport with constitutional standards of due process and would allow the president to violate binding treaties."<sup>210</sup> They further asserted that the use of such tribunals "would undercut the ability of the United States to protest when such tribunals are used against American citizens in other countries."<sup>211</sup>

Others argue that the use of the proposed tribunals "would breach international law guaranteeing fair treatment of prisoners of war."<sup>212</sup> Additionally, "[t]he critics, among them legal experts with military backgrounds, say the tribunals could create risks for the armed forces, including the possibility of charges by other countries that American officers who conduct tribunals are guilty of war crimes."<sup>213</sup> Further, some argue that it was unnecessary for the Military Commission Order to allow the Secretary of Defense to promulgate rules and procedures for the military commissions, when provisions of the Uniform Code of Military Justice already exist that are well-established and easily adaptable for use in military commissions.<sup>214</sup>

Civil libertarians indeed had cause for concern, as "[o]ur chief law enforcement officer, Attorney General John Ashcroft, told the nation that 'foreign terrorists who commit war crimes against the United States are not entitled to and do not deserve the protections of the American Constitution.'"<sup>215</sup> Later, Attorney General Ashcroft stated before the Senate Judiciary Committee on September 25, 2001, that "[t]he Justice Department will never

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<sup>209</sup> Katherine Seelye, *A Nation Challenged: The Military Tribunals: In Letter, 300 Law Professors Oppose Tribunals Plan*, N.Y. TIMES, Dec. 8, 2001, at B7.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Glaberson, *supra* note 144.

<sup>213</sup> *Id.*

<sup>214</sup> Rezneck & Potter, *supra* note 197, at 15.

<sup>215</sup> Daniel H. Pollitt, *Personal and Professional Responses to the Tragic Events of September 11, 2001: Civil Liberties in Times of Crises 3* (unpublished manuscript, on file with the North Carolina Journal of International Law and Commercial Regulation) (quoting *National Security State*, 273 THE NATION, Dec. 17, 2001 at 5).

waiver in our defense of the Constitution nor relent our defense of civil rights.”<sup>216</sup> The American Civil Liberties Union expressed concern that the President was “writing the judiciary out of the picture altogether. The President’s executive order . . . represents the ultimate form of court-stripping—literally removing Article III courts from the picture with no provision for judicial review of the tribunal’s actions.”<sup>217</sup> Kate Martin, Director for National Security Studies, had harsh criticisms for the Bush Administration when she spoke before the Senate Judiciary Committee in 2001.<sup>218</sup> Martin expressed concern for the lack of public debate about the use of military commissions, as well as the lack of congressional notification.<sup>219</sup>

The lack of congressional notification is especially troubling in light of the administration’s simultaneous request to the Congress to enact what was described as a comprehensive package of new authorities needed to combat terrorism passed as the USA PATRIOT Act.<sup>220</sup> The administration’s conduct calls into question its commitment to respecting the constitutional separation of powers and role of the Congress. Indeed, all of these actions would enhance the power of the Executive at the expense of the constitutional roles of both the Congress and the judiciary.<sup>221</sup>

Although it has been stated that Congress, not the President, alone has the power to authorize military tribunals,<sup>222</sup> this is not entirely true. Precedent has established that presidential orders

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<sup>216</sup> Review of Military Terrorism Tribunals: Submitted Statement to the Senate Judiciary Committee Concerning Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, 107th Congress (2001) (statement for the record of the American Civil Liberties Union), *available at* 2001 WL 1506625 (F.D.C.H.) [hereinafter ACLU Statement].

<sup>217</sup> *Id.*

<sup>218</sup> Review of Military Terrorism Tribunals: Hearing Before the Senate Judiciary Committee Concerning Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, 107th Congress (2001) (Statement of Kate Martin, Director, Center for National Security Studies), *available at* 2001 WL 1506632 (F.D.C.H.) [hereinafter Martin Statement].

<sup>219</sup> *Id.*

<sup>220</sup> Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>221</sup> Martin statement, *supra* note 218 (citation added).

<sup>222</sup> *Id.*

calling for military commissions have been found to be legitimate even if not explicitly approved by Congress with independent, current legislation.<sup>223</sup> Nevertheless, there is a bill currently in Congress that would explicitly authorize the use of military tribunals.<sup>224</sup> Martin further argued to the Senate Judiciary Committee that promulgating the order without approval from Congress violates the separation of powers.<sup>225</sup>

When the Supreme Court approved the use of military commissions in World War II, Congress had specifically authorized their use in the Articles of War<sup>226</sup> adopted to prosecute the war against Germany and Japan.

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Since the Supreme Court approved the use of military commissions to try offenses against the laws of war in World War II, the law of war and armed conflict has come to include the requirements that even those characterized as unlawful

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<sup>223</sup> The Court in *Ex parte Quirin* states:

By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

*Ex parte Quirin*, 317 U.S. 1, 28 (1942). See also Everett & Silliman, *supra* note 4, at 513-14 (citations omitted).

<sup>224</sup> Foreign Terrorist Military Tribunal Authorization Act of 2001, H.R. 3468, 107th Cong. (2001).

<sup>225</sup> Martin Statement, *supra* note 218.

<sup>226</sup> What was formerly known as the Articles of War were repealed for the most part in a restructuring of the Military Code. A few provisions were moved into new sections. What stands today is United States Code, Title 10: Armed Forces, which is generally contained in §§ 101-18505. See generally 10 U.S.C. §§ 101-18505 (2000). The Uniform Code of Military Justice is contained in Title 10, Subtitle A, Part II, Chapter 47, §§ 801-950, generally. See generally Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000). Title 50 of the United States Code contains provisions regarding War and National Defense. See generally 50 U.S.C. §§ 1-2484 (2000).

combatants accused of war crimes must be accorded fundamental due process. Thus, any constitutionally authorized military commissions would be bound by the current legal obligations assumed by the United States. These would include the United Nations charter and the International Covenant of Civil and Political Rights, none of which were in existence at the time the Supreme Court approved the use of military commissions during World War II. . . .

If military trials are deemed necessary for individuals captured in Afghanistan or fleeing therefrom, the Congress should authorize their use consistent with the requirements of due process enshrined in the Constitution and the international covenants agreed to by the United States.<sup>227</sup>

Martin goes on to discuss the importance of balancing accountability and human rights, a balance she sees as possible while simultaneously protecting national security interests.<sup>228</sup>

Despite these and many other arguments to the contrary, the use of military commissions has been upheld, although no set of predetermined rules has been laid out for their use.<sup>229</sup> Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial set forth procedures for use in military commissions, rather they make mention of them and seek to “preserve the American commander’s authority to exercise the entire power recognized as his under international customs and usages of war.”<sup>230</sup>

In enacting the Uniform Code of Military Justice in 1950, Congress reaffirmed its previous grant of authority to military tribunals to try violations of the law of war. Article 18 . . . provides that: “general courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” Similarly, Article 21 states that the provisions of the Code which confer “jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to

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<sup>227</sup> Martin Statement, *supra* note 218 (citation added).

<sup>228</sup> *Id.*

<sup>229</sup> Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT’L L. 659, 677 (1996).

<sup>230</sup> *Id.*

offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”<sup>231</sup>

Regarding the jurisdiction of the military commissions and the classification of the detainees, it is again argued that the United States could be setting an unwanted precedent for our own troops.<sup>232</sup> This is due to the fact that when military commissions are used to try persons not associated with a regular armed force, a precedent is being set that is a departure from “some of America’s most fundamental judicial traditions.”<sup>233</sup> Additionally, critics recognize the potentially negative foreign relations ramifications that accompany the use of military tribunals.<sup>234</sup>

It is ultimately up to the President, however, to determine the pros and cons of risks to intelligence and foreign policy that a military commission may produce.<sup>235</sup> One such cost is the compromising of U.S. intelligence efforts in discovering terrorist plots and preventing future terrorist attacks.<sup>236</sup> This cost is due to the disclosure of intelligence sources, methods, and investigative techniques that may occur during Article III trials, such as that which occurred during the 1993 trials of bombers of the World Trade Center.<sup>237</sup> On the other hand, military commissions would not be required to disclose such sources, and different procedures could be followed than those mandated in Article III courts.<sup>238</sup>

Recognition that the Constitution is not a “suicide pact” allows the government to participate in such cost/benefit analyses, which may result in trials that lack some constitutional protections.<sup>239</sup> During wartime, “the government enjoys extraordinary power” to make such determinations if national security concerns demand

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<sup>231</sup> Everett & Silliman, *supra* note 4, at 515 (citations omitted). See 10 U.S.C. § 821 (2000).

<sup>232</sup> Bringing Al-Qaeda to Justice, The Heritage Foundation Legal Memorandum: Executive Summary, Nov. 5, 2001, No. 3.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> David B. Rivkin et al., Bringing Al-Qaeda to Justice: The Constitutionality of Trying Al-Qaeda Terrorists in the Military Justice System, The Heritage Foundation Legal Memorandum, November 5, 2001, No. 3 at 2.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963)).



them.<sup>240</sup> Chief Justice Rehnquist asserted that “[i]n any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being.”<sup>241</sup>

On the other hand, it has been pointed out that the United States is not without precedent in trying those accused of terrorist acts in Article III courts:

In the past, the United States has treated individuals accused of terrorism as civilians, subject to trial in the federal courts established under Article III of the Constitution, with the full application of the Bill of Rights . . . . This was the case, for example, following the first attack on the World Trade Center in 1993. . . . Moreover, such treatment may have been Constitutionally mandated, since civilians are not ordinarily subject to military justice . . . .<sup>242</sup>

In fact, the United States Supreme Court mandated in the case of *Ex parte Milligan* that trial by military commission “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”<sup>243</sup>

However, the Court in *Ex parte Quirin* held that enemies who enter the United States for the purposes of committing destruction and remain here without uniform are subject to military law and to trial by military commission.<sup>244</sup> The Court distinguished *Milligan* on its facts, pointing out that *Milligan* was a non-belligerent.<sup>245</sup> In *Ex parte Quirin* the Court specifically held:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because [it is] in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance[,] and direction enter this

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<sup>240</sup> *Id.*

<sup>241</sup> WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (1998).

<sup>242</sup> Rivkin, *supra* note 236, at 4.

<sup>243</sup> *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

<sup>244</sup> *Ex parte Quirin*, 317 U.S. 1, 46 (1942).

<sup>245</sup> *Id.* at 45

country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.<sup>246</sup>

The results can be harsh when a prisoner is classified as an unlawful combatant, not deserving of the privileges of prisoner of war status.<sup>247</sup> This is not unusual under the customary rules of international law, where the protections associated with prisoner of war status, for one committing warlike acts, are predicated on an association with a lawful military organization.<sup>248</sup>

In further support for the domestic and international precedent of trying accused terrorists in military commissions, it is argued by some that prosecution of terrorists in Article III courts could prove to be ineffective due to the failure of the United States to successfully prosecute terrorists domestically.<sup>249</sup> Furthermore, it is argued that constitutional procedures themselves may hinder the effective detainment and prosecution of terrorists "as was the case when the Clinton administration declined Sudan's offer in 1996 to turn over Osama bin Laden because there was not sufficient probable cause to try him in U.S. Courts."<sup>250</sup>

One might wonder why existing international courts are not adequate venues for trying international terrorists. It is argued that they are not because:

[w]hile the International Criminal Court has been mentioned as a possible venue, the treaty establishing it is not yet in force, its jurisdiction does not include terrorist crimes and it does not have retroactive jurisdiction. It would take many years to select a prosecutor and judges, let alone prepare an indictment against key terrorist figures. In the case of the Yugoslavia tribunal, it took seven years to indict Slobodan Milosevic.<sup>251</sup>

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<sup>246</sup> *Id.* at 37-38.

<sup>247</sup> Rivkin, *supra* note 236, at 5.

<sup>248</sup> *Id.* at 5.

<sup>249</sup> Paul R. Williams & Michael P. Scharf, Commentary, *Prosecute Terrorists on a World Stage*, L.A. TIMES, Nov. 18, 2001, at Opinion M5.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* See also *Review of Military Terrorism Tribunals: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Scott L. Silliman, Executive Director for the Center on Law, Ethics and National Security) (discussing the jurisdictional inadequacies of currently existing international tribunals to try terrorists) [hereinafter Silliman Testimony].

*C. Military Commission Order #1 from the Department of Defense*<sup>252</sup>

On March 21, 2002, the Department of Defense released its rules and guidelines for the military commissions<sup>253</sup> that had been ordered by President Bush.<sup>254</sup> The Military Commission Rules contain a lengthy section entitled “Procedures Accorded the Accused,” and detail procedures that are very similar to those used in Article III, as well as those used in courts-martial, including: presentment of the charges to the accused in a language he or she understands; the presumption of innocence until proven guilty; findings based on evidence presented at trial; appointment of counsel if the accused requires such; access by the defense to evidence that the prosecution intends to use at trial (in a timely manner); the right of the accused not to testify at trial coupled with the mandate that there be no adverse inference from this refusal; if the accused elects to testify at trial, he or she will be subject to cross-examination; the ability of the accused to present evidence and confront adverse witnesses; provisions for the appointment of interpreters if necessary; and the accused shall not be tried a second time for a charge once a commission’s finding on that particular charge becomes final (in accordance with the Military Commission Rules).<sup>255</sup>

The Military Commission Rules further call for a full and fair trial that is carried out both impartially and expeditiously.<sup>256</sup> Surprisingly, the Military Commission Rules set forth that the proceedings are to be held openly, but not surprisingly there are

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<sup>252</sup> Military Commission Rules, *supra* note 6.

<sup>253</sup> *Id.*

Observers may be inclined to examine each separate provision and compare it to what they know of the federal criminal court system or the court-martial system, and feel that they might prefer a system that they were more comfortable with. . . . [W]e believe that most people will find that taken together, they are fair and balanced and that justice will be served in their application.

Secretary of Defense Donald H. Rumsfeld, United States Department of Defense News Transcript, DOD News Briefing on Military Commissions, at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html) (Mar. 21, 2002) (on file with the North Carolina Journal of International Law and Commercial Regulation) [hereinafter Rumsfeld Transcript].

<sup>254</sup> Military Commission Order, *supra* note 6.

<sup>255</sup> *Id.* § 5.

<sup>256</sup> *Id.* § 6(B).

numerous conditions and exceptions enumerated.<sup>257</sup> Among these exceptions are: 1) if closing the proceedings would protect classified or classifiable information; 2) if the information at risk of being disclosed is protected by law or rule from unauthorized disclosure; 3) if an open trial would endanger the physical safety of anyone involved in the commission; or 4) the all-encompassing exception for "other national security interests."<sup>258</sup> Interestingly, and somewhat problematically, the civilian defense counsel and the accused may both be excluded from a proceeding for the above-mentioned reasons.<sup>259</sup> However, the detailed defense counsel, appointed by the Chief Defense Counsel of the commissions (and a judge advocate of any armed force of the United States), may never be excluded from any of the proceedings, for any reason, presumably leaving the accused with some measure of procedural protections.<sup>260</sup> When allowed to be open, the provisions are quite liberal for just how open the proceedings may be:

Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the discretion of the Presiding Officer as necessary for preservation of the record of trial.<sup>261</sup>

Evidence is admitted, at the discretion of the Presiding Officer, if it "would have probative value to a reasonable person."<sup>262</sup> Donald Rumsfeld (U.S. Secretary of Defense) explained that during war, procedures for military commissions of this nature demand more inclusive rules of evidence than are used in Article III criminal trials.<sup>263</sup> "In wartime, it may be difficult to locate witnesses or establish chains of custody for documents. Critical

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*; *id.* § 6(C)(2).

<sup>261</sup> *Id.* § 6(B).

<sup>262</sup> *Id.* § 6(D)(1).

<sup>263</sup> Rumsfeld Transcript, *supra* note 253.

evidence that could protect the American people from dangerous terrorists should not be excluded simply because it was obtained under conditions of war.”<sup>264</sup>

In regard to deliberations for findings of guilt and sentencing, the Military Commission Rules provide that deliberations will be closed, guilt must be proven beyond a reasonable doubt, two-thirds of the commission members must agree for a finding of guilty to be accepted, two-thirds of the members must agree to determine the sentence for the defendant, and a unanimous vote is required for a death sentence.<sup>265</sup> The Military Commission Rules further provide that there must be seven members on a commission in order for the death penalty to be considered as a possible sentence; and that other possible punishments include a life sentence, fines or restitution, or “such other lawful punishment or condition of punishment as the Commission shall determine to be proper.”<sup>266</sup>

The Military Commission Rules do provide for a multi-step review process, but not outside a relatively narrow sphere of military officers, the Secretary of Defense, the appointing authority, and the President.<sup>267</sup> Beyond that, there are no provisions for appeals to any court of the United States or any international body. The President will himself determine which individuals will be subject to the order, with the caveat that such an individual may not be a U.S. citizen.<sup>268</sup>

The Vice Chairman of the Joint Chiefs of Staff expressed his satisfaction with the procedures set forth in the Military Commission Rules as well as the process that was undertaken to codify them:

I am personally very comfortable with these procedures. They are in fact fair, they are balanced, they are just. And I am also very proud of the process that we went through to get to these procedures. . . . It is well-suited to protect not only the rights of

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<sup>264</sup> *Id.*

<sup>265</sup> Military Commission Rules, *supra* note 6, § 6(F).

<sup>266</sup> *Id.* § 6(G).

<sup>267</sup> *Id.* § 6(H)(3)–(6).

<sup>268</sup> Department of Defense General Counsel William J. Haynes, United States Department of Defense News Transcript, DOD News Briefing on Military Commissions, Mar. 21, 2002, at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html) (on file with the North Carolina Journal of International Law and Commercial Regulation) [hereinafter Haynes Transcript].

the accused, but also, as the secretary mentioned, the safety of the participants in the trials, and also to protect our intelligence in the ongoing war on global terrorism. And finally, and very importantly, I have absolute faith in the men and women of our armed forces who, when called upon to participate in these commissions, will do their utmost to ensure a very fair, forthright, honest trial.<sup>269</sup>

Others have not been as pleased with the Military Commission Order or the Military Commission Rules, expressing concerns over the indefinite detentions of those captured and labeled as unlawful combatants.<sup>270</sup> In response, the Bush administration stated that they are "well within their rights to hold enemy combatants for the duration of the conflict, a conflict that admittedly has no end in sight."<sup>271</sup> Hence, the concern over the legality of indefinite detentions, as a war on terrorism would seem to have no ending point, save the settlement of all grievances the whole world over. The following statement by the Under Secretary of Defense, Douglas Feith, illustrates the vagueness of this notion of a war on terrorism:

[T]here has been for many years a debate about the nature of terrorism, and is it more in the nature of war or is it more in the nature of crime? And what was driven home by September 11th was obviously that it's both. . . . The enemy in this war, as opposed to past wars, is not, by and large, the regular armed forces of a country, wearing uniforms and attacking enemy armed forces. Here the enemy is a terrorist network with people who do not distinguish themselves as—in uniforms as soldiers, and their principal targets of attack are not armed forces but civilians.<sup>272</sup>

As to how the President has the authority to order military commissions when Congress has not yet declared war, Department

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<sup>269</sup> Marine Corps Gen. Peter Pace, Vice Chairman, Joint Chiefs of Staff, United States Department of Defense News Transcript, DOD News Briefing on Military Commissions, Mar. 21, 2002, at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html) (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>270</sup> Haynes Transcript, *supra* note 268.

<sup>271</sup> *Id.*

<sup>272</sup> Under Secretary of Defense Douglas Feith, United States Department of Defense News Transcript, DOD News Briefing on Military Commissions, Mar. 21, 2002, at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html) (on file with the North Carolina Journal of International Law and Commercial Regulation).

of Defense General Counsel Haynes stated that such an order is not limited to times of declared war.<sup>273</sup> He pointed out that the authority to order military commissions arises under Article II of the Constitution, which exists regardless of a state of peace or a state of war.<sup>274</sup> He further stated that regardless of the fact that Congress did not officially declare war, the United States is clearly in a “war situation” and thus, presumably, the President is acting accordingly in his response.<sup>275</sup>

Although many have expressed concern over the overly broad language of the executive order creating the military commissions, surprisingly, an article in the Journal of the American Bar Association (ABA) praised the procedures set forth by the Military Commission Rules, stating that the Bush administration took those fears into account with their promulgated rules.<sup>276</sup> Plus, “[a]t the same time, they retain the qualities the Bush administration says are needed to conduct swift trials outside the United States in order to protect witnesses, citizens, and military operations.”<sup>277</sup> In fact, Robert A. Clifford, the chair of the ABA’s Terrorism and the Law Task Force, indicated that the ABA would send a congratulatory letter to Donald Rumsfeld, Defense Secretary, in praise of his “responsiveness to the legal community’s call for caution and concern about the many due process and attorney-client issues associated with the prosecution of the detainees.”<sup>278</sup>

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<sup>273</sup> Haynes Transcript, *supra* note 268.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Molly McDonough, *Pentagon Releases Rules on Tribunals: Rules Match Many ABA Task Force Recommendations*, 1 A.B.A. J. eReport Issue 11 (2002), <http://www.abanet.org/journal/ereport/m22trib.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* In stark contrast, Robert E. Hirshon, President of the American Bar Association, expressed a deeply troubled sentiment over the Military Commission Rules, especially with regards to provisions that would allow eavesdropping on attorney-client communications if there is a reasonable suspicion that information regarding future acts of terrorism would be discussed. ABA Leadership: Statement of Robert E. Hirshon, President, American Bar Association, Nov. 9, 2001, at [http://www.abanet.org/leadership/justice\\_department.html](http://www.abanet.org/leadership/justice_department.html) (on file with the North Carolina Journal of International Law and Commercial Regulation).

## Conclusion

Words cannot begin to capture the profound terror and grief that gripped the United States on September 11, 2001. The impacts of terrorist actions are rarely, if ever, limited to only one community or one nation, as all humans are starkly reminded of their mortality and vulnerability. "It is, of course, recognized that a particular crime may cause such emotional reaction that it is difficult, if not impossible, for the one charged with its commission to receive a fair and impartial trial."<sup>279</sup> It is important that guilt and criminality are established for an accused before one considers possible punishments for an individual. This can be a difficult task when "embroiled in passion" that is incited by the high emotions caused by such catastrophic events.<sup>280</sup> In such circumstances, it is likely not a high priority of those enflamed by anger to ensure that the accused receive a fair trial, and even if it is, those looking from the outside may have trouble believing that a fair trial will take place.<sup>281</sup> The danger is that from the viewpoint of the outsider, the trial will appear to result from a cry for vengeance as opposed to a rational desire for just punishment. In 1945, President Harry Truman read the words of Justice Robert Jackson:

You must put no man on trial before anything that is called a court . . . , if you are not willing to see him freed if not proved guilty. If you are determined to execute a man in any case, there

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<sup>279</sup> APPLEMAN, *supra* note 1, at 9.

<sup>280</sup> *Id.* at 10.

<sup>281</sup> *Id.* Silliman discussed the potential diplomatic fallout from the use of military commissions:

It was but five years ago that the United States roundly condemned the conviction by a military tribunal in Peru of New York native Lori Berenson on charges of terrorism. Through official channels, we requested that she be retried in a civilian court because of the lack of due process afforded her in the tribunal. Our cries of unfairness were echoed by United Nations officials who openly criticized Peru's anti-terrorism military courts. There seems little difference in the measure of due process afforded Berenson in Peru and what is called for under the President's military order, and I believe this opens us to a charge of hypocrisy from the international community.

Silliman Testimony, *supra* note 251.



is no occasion for a trial, the world yields no respect to courts that are merely organized to convict.<sup>282</sup>

Justice Murphy aptly warned that if a peaceful international community, based on foundations of human rights and dignity is desired,

it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. . . . Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.<sup>283</sup>

Woodrow Wilson warned of the repercussions of filling people with the spirit of vengeance as motivation for entering into hostilities with other peoples or nations:

Once [you] lead this people into war and they'll forget there ever was such a thing as tolerance. To fight you must be brutal and ruthless, and the spirit of ruthless brutality will enter into the very fiber of our national life, infecting Congress, the courts, the policeman on the beat, the man on the street.<sup>284</sup>

We have to hope that the Bush administration will keep American, and in fact global, ideals of fundamental justice in mind and use its power accordingly in its selection of those to be tried by military commission and in its oversight of the process. The United States, in hand with the rest of the world, must continue to engage in productive dialogue on issues of foreign policy in order to allow truly compromised solutions to evolve. This is much favored over the self-destructive tendency of dismissing ideas that are different from our own.

In conclusion, history, customary international law, statutes, international treaties, and Supreme Court precedent establish that military commissions are a legitimate means of trying international terrorists. However, it is necessary to wait and see how they will proceed once individuals have actually been

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<sup>282</sup> MAGUIRE, *supra* note 35, at 98 (quoting ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 69 (1984)).

<sup>283</sup> *In re Yamashita*, 327 U.S. 1, 29–30 (1946) (Murphy, J., dissenting).

<sup>284</sup> Pollitt, *supra* note 215, at 3 (quoted in Alan M. Winkler, *President Can't Wage Successful War if Public Doesn't Want It*, CINCINNATI POST, Feb. 23, 1998).

selected and tried, before conclusions of whether justice has been served can be reached. In fact, as of December 2002, not one military commission has been convened.<sup>285</sup> The Bush administration has been careful and deliberate thus far in creating and promulgating the rules for the commissions. One can only hope that the operation of the military commissions will be equally careful and deliberate in providing justice that will stand up to the ideals of a world community, not just the standards of those who seek retribution.<sup>286</sup>

HEATHER ANNE MADDOX

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<sup>285</sup> Neil A. Lewis, *Threats and Responses: Military Justice; Administration's Position Shifts on Plans for Tribunals*, N.Y. TIMES, Nov. 2, 2002, at A8.

<sup>286</sup> Kofi Annan eloquently summarized the balance that must be struck between protectionism and anti-terrorism:

Terrorism is one of the threats against which States must protect their citizens. States have not only the right but also the duty to do so. But States must also take the greatest care to ensure that counter-terrorism measures do not mutate into measures used to cloak, or justify, violations of human rights. Terrorism has a nasty habit of causing the whole spectrum of opinion in a society to lurch in a repressive direction.

Annan statement, *supra* note 45.